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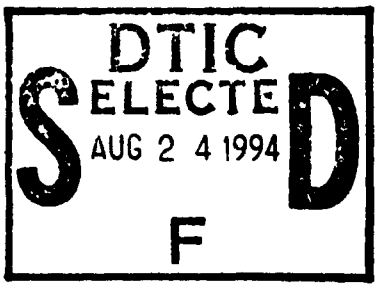

THESIS

ALTERNATIVE DISPUTE RESOLUTION: A CASE ANALYSIS OF A NEGOTIATED SETTLEMENT

by

Frederick M. VanLuit

June, 1994

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There has been a recent increase in emphasis by the Federal Government on using alternative dispute resolution methods to resolve contract disputes. These methods are normally less expensive, faster, less intimidating and more responsive to the underlying problems of the dispute.

Alternative dispute resolution is not effective for all disputes. Situations in which alternative dispute resolution would be effective are identified. Additionally, the characteristics and advantages of alternative dispute resolution are discussed. The current legislation concerning the Government's usage of alternative dispute resolution is the Administrative Dispute Resolution Act of 1990. The specific components of the Act are reviewed. The conventional dispute resolution process, and its disadvantages, are presented for comparison purposes.

In September 1993, the United States Navy and Lockheed Corporation successfully used negotiations to settle a dispute concerning the termination of the Long Range Anti-submarine Warfare Capability Aircraft program. A case analysis was conducted on the issues of the dispute, the reasons a negotiated settlement was used and of the actual negotiation process and results.

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Alternative Dispute Resolution:
A Case Analysis of A Negotiated Settlement

by

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Submitted in partial fulfillment
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ABSTRACT

There has been a recent increase in emphasis by the Federal Government on using alternative dispute resolution methods to resolve contract disputes. These methods are normally less expensive, faster, less intimidating and more responsive to the underlying problems of the dispute.

Alternative dispute resolution is not effective for all disputes. Situations in which alternative dispute resolutions would be effective are identified. Additionally, the characteristics and advantages of alternative dispute resolution are discussed. The current legislation concerning the Government's usage of alternative dispute resolution is the Administrative Dispute Resolution Act of 1990. The specific components of the Act are reviewed. The conventional dispute resolution process, and its disadvantages, are presented for comparison purposes.

In September 1993, the United States Navy and Lockheed Corporation successfully used negotiations to settle a dispute concerning the termination of the Long Range Anti-submarine Warfare Capability Aircraft program. A case analysis was conducted on the issues of the dispute, the reasons a negotiated settlement was used and of the actual negotiation process and results.

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I. INTRODUCTION

A. BACKGROUND

Despite all efforts to ensure Federal Government contracts clearly define the responsibilities of all parties involved, the possibility that the parties will disagree on an aspect or requirement of the contract still exists. Formal litigation has been the most common method of resolving contract disputes between the Federal Government and their contractors. However, formal litigation is not always the most efficient or effective method available for resolving contract disputes. There has been a recent increase in emphasis by the Federal Government on using alternative dispute resolution methods to resolve contract disputes.[Ref. 1]

Although using an alternative dispute resolution method is not suitable for all contract disputes, these methods are normally less expensive, faster, less intimidating, more sensitive to disputants' concerns and more responsive to underlying problems. They usually dispense better solutions, result in less alienation, produce a feeling that a dispute was actually heard and fulfill a need by the disputants to retain control by not handing the dispute over to lawyers, judges and the intricacies of the legal system.[Ref. 2]

There are a myriad of different alternative dispute resolution methods available to the Federal Government; but, there is no one best way that can solve all disputes. The nature of the dispute and of the parties involved will determine which method of dispute settlement will be the most appropriate. It is essential for contracting officers to be familiar with the advantages and disadvantages of the different alternative dispute resolution methods in order to ascertain which, if any, can be used in place of formal litigation to settle contract disputes.

A case study of an actual dispute that was resolved using a negotiated settlement identifies specific issues that have to be addressed before making the decision to use an alternative dispute resolution method. It provides insight on both parties' viewpoints on why the alternative dispute resolution method was the most advantageous means available to settle the contract dispute.

B. OBJECTIVES

The primary objectives of this thesis are:

1. To provide background on alternative dispute resolution methods and to ascertain the current climate that exists in the government for using alternative dispute resolution to settle contract disputes.

2. To weigh the benefits and limitations of alternative dispute resolution methods against the use of traditional formal litigation to settle contract disputes.

3. To identify and discuss the different types of alternative dispute resolution methods and to address advantages and disadvantages of each.

4. To measure the effectiveness of alternative dispute resolution by conducting a case analysis of an actual contract dispute that was settled using an alternative dispute method.

C. RESEARCH QUESTIONS

1. Primary Research Question

Why was a negotiated settlement used to solve the P-7A program dispute and what were the characteristics and results of the process?

2. Subsidiary Research Questions

a. What did both parties perceive to be the positive and negative aspects of using an alternative dispute resolution?

b. Given the positive and negative aspects of the alternative dispute resolution, will alternative dispute resolution methods be the preferred option to resolve future contract disputes.

c. What is the Federal Government's current policy concerning the use of alternative dispute resolution to settle contract disputes with their contractors.

d. What are the most common types of alternative dispute resolution available to the Federal Government for solving contract disputes?

D. SCOPE

This thesis focuses on the most common alternative dispute resolution methods and their applicability for usage by the Federal Government. A literary search was conducted to develop background information on alternative dispute resolution

methods and to identify characteristics of specific alternative dispute resolution methods. The research identified the criteria necessary and the preferred environment that should exist prior to choosing an alternative dispute resolution method.

The thesis includes a case analysis of an actual contract dispute that was resolved using an alternative dispute resolution method. The case analysis outlines the characteristics of an actual alternative dispute resolution and provides insight to the parties' perspective on the use of alternative dispute resolution.

There is no attempt to develop empirical data within the scope of this thesis. Only existing data and information was used within the scope of this thesis.

E. LIMITATIONS

There is a minimum of empirical data available to support opinions and information derived in the thesis. All information on alternative dispute resolution is based on expert opinions and not on factual information.

The information concerning the alternative dispute resolution case study is litigation sensitive. Therefore, to best protect the sensitivity of the case, no information could be sent to the researcher. The researcher had to travel to the

location of the material and was not able to keep any documentation concerning the case. This made the process of verifying facts difficult as the writing of the thesis continued.

F. ASSUMPTIONS

This thesis was written under the following assumptions:

1. The reader has some knowledge of Federal Government contracting regulations concerning contract settlement procedures.
2. The reader has legal assistance available to clarify and enhance information provided.

G. LITERATURE REVIEW AND METHODOLOGY

The literature review was conducted from sources in both the public and private sectors which specialize in alternative dispute resolution. Their areas of concern ranged from user, research and policy implementation.

Types of literature which were reviewed included:

1. Books on types and processes of the different alternative dispute resolution methods.
2. Magazine articles which stated opinions of and issues concerning alternative dispute resolution methods.
3. Policy papers conducted by Federal Government agencies stating policy and procedures of using alternative dispute resolution.
4. House of Representative hearings and acts concerning alternative dispute resolution.

5. Interviews with personnel involved with the alternative dispute resolution case analysis.

The literature review was conducted to supply the researcher with sufficient information on all aspects of alternative dispute resolution methods. In doing so, the Government's policy and views concerning the use of alternative dispute resolution to solve contract disputes was established.

The case analysis of a contract dispute which was settled using a alternative dispute resolution method involved research of the documentation concerning the dispute. Interviews of the personnel involved with the case were conducted to support the documentation and to ascertain the parties' positions that existed during the dispute resolution.

H. ORGANIZATION OF STUDY

This thesis is arranged into five chapters. Chapter I provides a brief background of alternative dispute resolution methods and states the objectives and research questions of the thesis. It delineates the scope, limitations and assumptions of the thesis and outlines the methodology used to conduct the necessary research.

Chapter II defines alternative dispute resolution, discusses related legislature and outlines the suitability and advantages of using alternative dispute resolution to settle

contract disputes. Chapter II discusses inefficiencies and disadvantages that exist in using formal litigation. Chapter II describes the environment that exists today concerning the usage of alternative dispute resolution.

Chapter III defines and discusses the most common types of alternative dispute resolution methods and gives the advantages and disadvantages of each type.

Chapter IV presents the data obtained from the case analysis and analyzes the alternative dispute resolution process and present each parties's position and views of that process.

Chapter V summarizes the findings, analyzes the data addressed in previous chapters and makes conclusions and recommendations based on that data. This chapter answers the research questions and states recommendations for further research.

II. BACKGROUND ON ALTERNATIVE DISPUTE RESOLUTION

A. INTRODUCTION

Current interests in alternative dispute resolution are not a new phenomenon[Ref. 3]. In 1850, Abraham Lincoln succinctly put it:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will be business enough.[Ref. 4]

That outlook still exists today. The use of alternative dispute resolution will play a role in President Clinton's initiative to streamline Government. During his presidential campaign he stated:

> In my view, the best reforms are those that make it less likely for people to go to court. We should encourage greater use of alternative dispute resolution to give consumers redress without having to litigate, such as mediation, mini-trial and the multi-door courthouse. [Ref. 5]

The need for simplified dispute resolution processes is underscored by the growth in Federal regulations and related litigation[Ref. 6]. The number of lawsuits filed in the United States is enormous. According to the Administrative

Office of the U.S. Courts, the total number of civil cases commenced in the United States totaled over 220,000 in 1989. The Federal Government was party in over 55,000 of these cases.[Ref. 7] The Administrative Conference of the United States is an independent agency whose purpose is to promote improvement in the efficiency, adequacy and fairness of procedures by which Federal agencies conduct regulatory programs, administer grants and benefits, and perform related Governmental functions[Ref. 8]. The Administrative Conference's studies on the use of alternative dispute resolution have determined that their appropriate use throughout the Federal Government will:

1. Enhance the responsiveness of agencies.
2. Increase the acceptability of their decisions.
3. Help reduce the contentiousness, delay and expense often associated with agency decision making.[Ref. 9]

To promote the use of alternative dispute resolution the Congress passed the Administrative Dispute Resolution Act of 1990. This Act has helped pave the way for alternative dispute resolution becoming a preferred method of settling contract disputes in the Federal Government.

B. DEFINITION

The term "alternative dispute resolution" as per the Administrative Dispute Resolution Act:

> means any procedure that is used, in lieu of an adjudication, as defined in section 551(7) of this title, to resolve issues in controversy, including but not limited to, settlement, negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration, or any combination thereof.[Ref. 10]

Section 551(7) further defines "adjudication" to include "agency process for the formulation of an order" and section 551(6) defines an "order" as "the final disposition... of an agency in a matter other than rulemaking"[Ref. 11]. Subsequently, alternative dispute resolution can broadly include any procedure an agency may use to resolve any issue in controversy in any federal activity.[Ref. 12]

C. CONVENTIONAL DISPUTE RESOLUTION

1. Background

In 1978, Congress enacted the Contract Disputes Act to bring greater consistency, fairness and efficiency to the resolution of contract disputes with the Federal Government.[Ref. 13] The Act established specific procedures and time frames that applied to all complaints involving the Federal Government. The goal of the Contract Disputes Act was to provide an informal and expeditious process for resolving disputes without disrupting contract performance.[Ref. 14]

2. Process

The initial step of any complaint is for the contractor to submit the complaint in writing to the Government Contracting Officer for final decision. The Contracting Officer is the only point of entry for any complaint involving a Government contract. The Contracting Officer has to make a decision on that claim before it can be presented to any other tribunal. The Contract Disputes Act also gives the Contracting Officer the authority to use an alternative dispute resolution technique to resolve the claim amicably. The Contracting Officer's decision on the claim is final, conclusive and not subject to review unless a timely appeal is submitted to a proper forum. Upon a final decision, the contractor can litigate the Contracting Officer's decision in either of two forums: the appropriate board of contract appeals or the U.S. Claims Court.[Ref. 15]

The Armed Services Board of Contract Appeals (ASBCA) is the oldest and largest board of appeals[Ref. 16]. The following are standard procedures that are followed by the ASBCA when processing a claim against the Government after a final decision by the Contracting Officer:

1. Appeals - The contractor must file with the ASBCA written notice of appeal within ninety days of receipt of the decision.

2. Appeal File - The Contracting Officer must file with the ASBCA all pertinent documents within thirty days of receipt of the appeal.

3. Complaint - The contractor must file the complaint setting forth the basis for and the amount of the claim within thirty days of docketing the appeal of the ASBCA. The Government's reply is due within thirty days after receipt of the complaint.

4. Written Discovery - The ASBCA rules provide that responses to interrogatories, requests for admission and requests for production of documents are due within forty-five days after service.

5. Depositions - The deposition practice before the ASBCA has become nearly as extensive as in typical court litigation.

6. Subpoenas - The ASBCA has the power to issue subpoenas compelling testimony in deposition at trial.

7. Hearings - are conducted before one of the members of ASBCA members and a written transcript is produced.

8. Decisions - After the hearings, the parties customarily submit simultaneous post hearing briefs. The ASBCA then issues a decision in writing.[Ref. 17]

The appeals process is often characterized as being complex and inefficient. Despite this, the number and frequency of disputes requiring resolution by boards of contract appeals has continued to increase. Reasons for this include:

1. Historical reasons, such as the growing impact of Government contracting, increased complexity of contracts, new auditing and other regulatory requirements and an expanded notion of necessary due process rights.

2. More contractors have developed a dependence on the Government for their existence.

3. There is a increased willingness to resort to litigation among contractors and an expanding Government contracts bar.

4. There is an increasing public division or controversy over the wisdom of some kinds of defense expenditures, which often is vented peripherally in controversies over contract or administration decisions.

5. Increased scrutiny by many congressional sources may discourage Contracting Officers or their supervisors from risking close calls or taking on politically sensitive cases.

6. The establishment of intra-agency audit offices and statutes or rules enhancing their authority, has served to inhibit settlement of disputes and limit decisional flexibility. [Ref. 18]

The combined result of the above factors has reduced a willingness or ability of Contracting Officers to assume during their decision-making responsibilities, and has increased doubt that the Contracting Officers truly act to serve the best interests of the Government. [Ref. 19]

3. Disadvantages of Conventional Dispute Resolution

The following negative factors exist in conventional resolution processes. These further support the idea that alternative dispute resolution methods should be utilized whenever possible.

1. Cost, delay:

   (a) The process is expensive; costs often exceed benefits.

   (b) Litigation does not provide timely resolution of the dispute; delay imposes additional costs.

(c) The process consumes resources that could be applied to solve the problem.

2. Access, participation:

(a) Court proceedings and methods are difficult to understand.

(b) Using courts requires employment of expensive intermediaries.

(c) The differences in knowledge of the system and ability to bear costs, delay and uncertainty can create inequities between parties.

3. Inappropriateness of forum:

(a) Courts may lack expertise in the subject matter of the dispute.

(b) Courts transform disputes in ways that obscure the genuine issues between the parties.

(c) Courts may be unable to give a remedy that addresses the underlying causes of the dispute.

(d) The adversarial setting polarizes the parties and deflects them from the search for an optimal solution.

4. Additional effects

(a) The adversarial nature of the proceedings disrupt continuing relations between parties.

(b) Court decisions may channel energy to preparation for further adversarial encounters rather than preventive problem solving. [Ref. 20]

A principle objective of the Contracting Officer in settling contract disputes is to avoid the above factors. He can achieve this by increasing his use of alternative dispute resolution. By recognizing the usefulness of alternative dispute resolution in his decision-making, by encouraging

greater application of alternative dispute resolution and by improving the alternative dispute resolution skills of personnel who participate in the contracting process, Government contracting agencies can create a climate in which more disputes are rationally and justly settled without resorting to litigation.[Ref. 21]

D. ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1990

1. Background

The Administrative Dispute Resolution Act establishes a statutory framework for federal agency use of alternative dispute resolution in accordance with reforms advocated by the Administrative Conference of the United States. States, courts and private entities have increasingly used alternative dispute resolution in the past decades. The Act seeks to prod federal agencies to use alternative dispute resolution methods to enable the parties to foster creative, acceptable solutions and to produce expeditious decisions requiring fewer resources than formal litigation. Prior to enactment of the Administrative Dispute Resolution Act, the Administrative Conference had repeatedly encouraged federal agency use of alternative dispute resolution processes, but progress had been slow. The legislation seeks to broaden agency authority, resolve legal questions and prompt agencies to use more

consensual processes to enhance the possibility of reaching agreements expeditiously, within the confines of agency authority. Congress' findings have concluded that alternative dispute resolution can lead to more creative, efficient, stable and sensible solutions.[Ref. 22]

2. Promotion of the Act

"Findings", Section 2 of the Administrative Dispute Resolution Act concludes that the public will benefit from the efficiencies, cost savings and less contentious decision-making that alternative dispute resolution will produce. To achieve these benefits, section 3 of the Administrative Dispute Resolution Act outlines actions the agencies must take to promote the use of alternative dispute resolution.

a. Promulgation of Agency Policy

Each agency must adopt a policy that addresses the use of alternative dispute resolution. In developing the policy each agency will:

1. Consult with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service.

2. Examine means of resolving disputes in connection with:

   (a) formal and informal adjudication
   (b) rulemaking
   (c) enforcement action
   (d) issuing and revoking licenses or permits
   (e) contract administration
   (f) litigation brought by or against the agency
   (g) other agency actions.[Ref. 23]

Developing the policy should be a dynamic process and should used as a management tool in order to:

1. Declare official agency support, at the highest levels, for using alternative dispute resolution to improve the operation of the agency programs.

2. Identify sources of delay and inefficiency in existing procedures.

3. Establish goals and a timetable for reducing delay and inefficiency.

4. Educate agency personnel about the availability and uses of alternative dispute resolution.

5. Foster an interest among agency personnel in using informal consensual methods to resolve disputes.[Ref. 24]

b. Dispute Resolution Specialists

The head of each agency will designate a senior official to be the dispute resolution specialist of the agency. The official will be responsible for the implementation of the Administrative Dispute Resolution Act and the corresponding policy developed by the agency.[Ref. 25]

c. Training

Each agency will provide training on a regular basis for the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency. The training should include the theory and practice of negotiation, mediation, arbitration and related techniques. The dispute resolution specialist will periodically recommend

to the agency employees who would benefit from similar training.[Ref. 26]

d. Procedures for Grants and Contracts

Each agency will review each of its standard agreements for contracts, grants and other assistance and determine whether to amend any such agreements to authorize and encourage the use of alternative dispute resolution methods.

Within one year after the enactment of the Administrative Dispute Resolution Act, the Federal Acquisition Regulations will be amended as necessary to carry out the Act.[Ref. 27]

3. Key Provisions of the Act

a. Authority to Use Neutrals

Agencies can employ the use of mutually acceptable neutrals to serve as a conciliator, facilitator or mediator. The neutral cannot have an official, financial or personal conflict of interest with respect to the issue in controversy unless this interest is fully disclosed in writing to all parties and then the parties agree to the neutral.[Ref. 28]

The Administrative Conference of the United States will establish standards for neutrals and maintain a roster of individuals who meet those standards. These individuals will

be made available upon request and will be compensated by the parties in dispute.[Ref. 29]

b. Confidentiality

The Administrative Dispute Resolution Act establishes rules to protect the confidentiality of the alternative dispute resolution proceedings. These protections are to enable the parties to be forthcoming and honest without the fear of their statements being used against them. Documents produced during an alternative dispute resolution are immune to discovery unless certain specific conditions exist.[Ref. 30]

c. Use of Arbitration

The Administrative Dispute Resolution Act authorizes the use of arbitration whenever the parties consent in writing. To ensure the arbitration is truly voluntary, the Federal Government is prohibited from requiring any party to consent to arbitration as a condition of receiving a contract or benefit. The Administrative Dispute Resolution Act specifies that a head of an agency is authorized to terminate an arbitration hearing at any time prior to the award becoming final. An award becomes final 30 days after it is served on the parties. After the award becomes final it is binding and enforceable on the Government.[Ref. 31]

d. Amendments to the Contract Disputes Act of 1978

The Contract Disputes Act is amended to make clear that Government contracting officers and boards of contract appeals are encouraged to resolve claims by use of alternative dispute resolution methods and have the authority to do so. [Ref. 32]

4. Advantages of Alternative Dispute Resolution

There are a number of distinct advantages that alternative dispute resolution methods have over adjudication. These advantages can translate into better, quicker and less expensive solutions to contract disputes. The advantages include:

1. Faster process - This results in Government and contractor resources not being tied up while a decision is pending. Depending on the type of dispute, by using an alternative dispute resolution method, a decision could be made within months compared to a court decision which might take years.

2. Cost savings - If you settle a dispute process quicker, it will result in lower attorney and related legal fees and will keep production moving.

3. Flexibility - The parties can structure the process to meet their specific needs. They determine details such as rules and procedures, who will be involved, time and location and the length of discovery.

4. Managerial control - Alternative dispute resolution methods allow managers to maintain control over the process. Since their company's time and resources are being spent, they will attempt to come to a quick decision in order to save time and resources.

5. Non-adversarial - Unlike adjudication, alternative dispute resolution focus on cooperation instead of being adversarial. This usually produces a win-win situation and can help prevent tension between the paries in future relations.

6. Confidentiality - This allows the parties to openly discuss and solve their disputes without being subject to public scrutiny.

E. USE OF ALTERNATIVE DISPUTE RESOLUTION

Analyzing where alternative dispute resolution can be used effectively is one of the most important concerns an agency has in developing an effective alternative dispute resolution program. It requires understanding the various types of alternative dispute resolution methods and which of the methods might be useful in particular types of disputes. The following is a list of situations where using an alternative dispute resolution method to settle a contract dispute would be effective:

1. Creative solutions, not necessarily available in formal adjudication, may provide the most satisfactory outcomes.

2. The cases do not involve or require the setting of precedent.

3. All the substantially affected parties are generally involved in the proceeding.

4. Variation in outcome is not a major concern.

5. Maintaining confidentiality is not a concern or would be advantageous.

6. Parties are likely to agree to use alternative dispute resolution.

7. Litigation in the particular context is generally a lengthy and/or expensive process.

8. Cases of this frequently settle at some point in the process.

9. The potential for impasse is high, because of poor communication among parties, conflicts within parties or technical complexity or uncertainty.[Ref. 33]

Conversely, there are distinct situations in which an agency should consider not using an alternative dispute resolution method to settle a dispute. These situations are specifically addressed in the Administrative Dispute Resolution Act. An agency will consider not using a alternative dispute resolution proceeding if:

1. A definitive or authoritative resolution of the matter is required for precedential value and such a proceeding is not likely to be accepted generally as an authoritative precedent.

2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made and such a proceeding would not likely serve to develop a recommended policy for the agency.

3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions.

4. The matter significantly affects persons or organizations who are not parties to the proceeding.

5. A full public record of the proceeding is important and a dispute resolution proceeding cannot provide such a record.

6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances and a

dispute resolution proceeding would interfere with the agency's fulfilling that requirement.[Ref. 34]

F. RESULTS OF ALTERNATIVE DISPUTE RESOLUTION USAGE

Alternative dispute resolution methods have been used by several agencies in enforcement cases and other regulatory proceedings, as well as for resolving contract disputes, personnel and equal opportunity disputes and environmental cases. Results of their use has been impressive. The Department of Labor ran a pilot program in one of its regional offices using mediation to resolve enforcement cases involving the workplace, including cases involving the Occupational Safety and Health Administration, and wage and hour regulations. The Department's evaluation of the program documented that both agency and industry parties were quite satisfied with the use of alternative dispute resolution and that in many cases the results of the mediation were quicker and better than litigation. The Department has recently decided to expand the program to all of their regions. The Farmers Home Administration found that it saved millions of dollars using mediation to avoid foreclosures in farmer-lender disputes. The Federal Deposit Insurance Corporation has saved millions of dollars in 1992 alone in litigation costs from its mediation program involving creditor claims arising from failed banks. And the Environmental Protection Agency has had

significant successes using regulated negotiations as well as with mediation to resolve Superfund hazardous waste cleanup proceedings.[Ref. 35]

The Department of Defense should see similar positive savings as contracting activities structure alternative dispute resolution procedures, as required by the Administrative Dispute Resolution Act, into their command policies.

G. SUMMARY

There has been an increased emphasis by the Federal Government concerning the usage of alternative dispute resolution to settle contract disputes with their contractors. Using conventional dispute resolution can result in several disadvantages to the disputants. When utilized correctly, alternative dispute resolution can offer a process in which these disadvantages would be nonexistent. However, alternative dispute resolution can only be used if contracting officers are familiar with the different processes and the situations where they are used most effectively.

The U.S. Congress passed the Administrative Dispute Resolution Act of 1990 in order to promote the use of alternative dispute resolution by Federal contracting officers. As required by the Act, the implementation of an

alternative dispute resolution program and continued training on that program, should result in a substantial increase of alternative dispute resolution usage by Federal agencies.

III. ALTERNATIVE DISPUTE RESOLUTION METHODS

A. INTRODUCTION

Alternative dispute resolution methods can range from the most rule bound and coercive to the most informal. Specific methods differ in various ways, such as:

1. Whether participation is voluntary.
2. Whether decisions are made by disputants or by a third party.
3. Whether the procedures employed are formal or informal.
4. Whether the decision is legally enforceable. [Ref. 36]

Alternative dispute resolution methods are numerous and diverse, they range along a spectrum from consensual decision-making techniques, such as mediation, to more definitive techniques, such as binding arbitration. Alternative dispute resolution methods tend to emphasize cooperation and creativity in choosing and using processes that can best settle the dispute and subsequently result in more acceptable and more efficiently made decisions. [Ref. 37]

Among the most common and effective types of alternative dispute resolution methods are negotiation, mediation, arbitration, mini-trial and fact-finding.

B. NEGOTIATION

In negotiations, the parties seek to resolve a disagreement or to plan a transaction through discussions with the assumption that the parties will divide a limited resource to the mutual satisfaction of both parties.

Negotiation is the most common form of alternative dispute resolution and should be used by contracting officers as the first step in resolving disputes. The parties should attempt to work out their problems directly through collaborative or adversarial approaches between themselves before employing another method of dispute resolution [Ref. 38]. If another type of alternative dispute resolution is used, it is usually a variation of negotiation involving the use a neutral third-party to assist in the process.

Although there is no set rules or procedures in negotiations, there are five basic points that should be followed to facilitate negotiations [Ref. 39]:

1. Separate the people from the problem - The negotiators should see themselves as attacking the problem posed by the negotiator, not each other.

2. Focus on interests not positions - Your positions are what you want. Your interests are why you want them. Focusing on interests may uncover the existence of mutual or complementary interests that will make agreements possible.

3. Invent options for mutual gain - Even if the parties' interests differ, there may be bargaining outcomes that will advance the interests of both. Develop a win-win situation.

4. Insist on objective criteria - There are some negotiations, or at least some issues that are not susceptible to a win-win situation. In order to minimize the risk of inefficient haggling or a failure to reach an agreement, the parties should first attempt to agree on objective criteria to govern the outcome.

5. Know your Best Alternative to a Negotiated Agreement (BATNA) - The reason you negotiate with someone is to produce better results than you could obtain without negotiating. Know the results you would obtain with unsuccessful negotiations before accepting an agreement you would be better off rejecting.

1. Advantages

Negotiations are usually voluntary, informal and unstructured. They facilitate an environment that will result in an agreement that is mutually acceptable to all concerned parties. Negotiations place a premium on control by the parties. This enables the process to remain flexible and open to the needs of the disputants. Negotiations usually are non-adversarial in nature, this enhances the disputants' ability to maintain a good relationship during future endeavors.

The negotiation process and results are of a private nature and are not subject to public scrutiny. Being so, negotiators are only concerned with how they perceive the results and not on how other interested, but uninvolved, parties might perceive the results.

The predominant reason that negotiations are becoming more widely used is that the characteristics of the negotiation process generally lead to more timely and cost-

effective settlements, as opposed to the other options available to settle the dispute.

2. Disadvantages

Negotiations are usually not effective in adversarial environments. For effective negotiations, both parties must be willing to negotiate with the goal of finding a mutually acceptable agreement. Results of the negotiations are enforceable only to the extent of a settlement agreement; subsequently, if the parties are unwilling to compromise their positions, they should not waste their time and resources by entering into negotiations.

Negotiations are not always effective for Government contract disputes. Government personnel can lack equal negotiating skills and experience of government personnel of negotiators in the private sector, so it is imperative that the Government uses capable personnel to negotiate contract disputes in order to best protect the public's interest. Additionally, negotiations are not always suitable for disputes which might establish precedence or might be of public concern[Ref. 40]. Before deciding to use negotiations, a Contracting Officer must be aware of the interest the public might have on the outcome of the dispute. For example, if there was an indication of fraud by a

contractor, the public would not be pleased if the matter was resolved used negotiations.

C. MEDIATION

Mediation is ordinarily an informal , non-binding process in which a neutral third-party assists the parties in reaching a negotiated settlement of their differences. Mediation is most appropriate for disputes in which the parties have reached, or anticipate reaching, a negotiation impasse. Factors which contribute to a negotiation impasse include personality conflicts, poor communication, the existence of multiple parties, or inflexible negotiating postures [Ref. 41]. A mediator can assist the parties in breaking down barriers and coming to an agreement by helping them develop options, compromising and exploring acceptable settlements to the dispute.

Mediation might prove most effective in situations where [Ref. 42]:

1. Multiple issues have to be resolved.
2. There is no need to establish precedent and there is no single "right" solution that is required.
3. Tensions, emotions, or transaction costs are running high.
4. Communication between the parties has broken down.
5. Time is a major factor.

6. Failure to agree does not clearly benefit one or more parties.

7. Issues are complex and individual parties have an interest in maintaining confidentiality with respect to key issues.

8. The parties want or need to maintain some ongoing relationship.

The role of the mediator can be as active as the parties permit, thus keeping the parties in control of the process. To facilitate the communication and negotiation between the parties, the mediator can be expected to fulfill any of the following roles:

1. Urging participants to agree to talk.

2. Helping participants understand the mediation process.

3. Carrying messages between the parties.

4. Helping participants agree on an agenda.

5. Setting an agenda.

6. Providing a suitable environment for negotiation.

7. Maintaining order.

8. Helping participants understand the problems.

9. Defusing unrealistic expectations.

10. Helping participants develop their own proposals.

11. Helping participants negotiate.

12. Persuading participants to accept a particular solution. [Ref. 43]

The mediator must develop a strategy to accomplish the role he is tasked to fulfill. Each situation is unique in its

characteristics, the following influences should be considered by the mediator in development of his strategy:

1. The number and identity of the participants and their previous relationship.
2. Whether participants will have relationship in the future.
3. The subject matter.
4. The degree of crisis.
5. Whether third parties are affected.
6. Whether society is affected.
7. The risk of non-settlement.
8. The alternatives to mediated agreement. [Ref. 44]:

1. Advantages

The advantages of mediation are similar to those of negotiation. Mediation is also flexible, voluntary, timely, cost-effective, private and structured to meet the needs of the specific situation. Mediation will break down barriers that previously existed and can establish an environment in which the parties effectively communicate and settle the dispute. As with negotiation, the integrity of the mediation is assured by the self-interest of each party.

The mediator can convey a different perspective on the issues involved and ensure the parties are moving in a positive direction towards settlement. If the parties are

unfamiliar with alternative dispute resolution methods, a successful mediation may provide the parties with a basis in which they can negotiate their own dispute settlements in the future.

2. Disadvantages

Since mediation is non-binding and voluntary, to be effective both parties must be willing to participate in good faith and be willing to accept the results of the process. If the parties are moving in a direction in which reaching a settlement will be unlikely, they should consider proceeding with another form of resolution. Accordingly, mediation would be ineffective when the extremity of hostility would make any form of discussions useless.

It is not advisable to use mediation when one party's position is weaker than the other party's. Mediation works best when the parties have equal negotiation power, resources and information. This enables the mediator to remain impartial and not put in a position of having to act as an equalizer.

D. ARBITRATION

The essence of arbitration is that a neutral third party selected by the disputing parties decides the issues after receiving evidence and arguments from the parties. The neutral is selected primarily because of subject-matter expertise.

Arbitration may be binding on the parties by operation of law or through contractual agreement. Non-binding arbitration is also practiced to a limited extent. Arbitration may be either voluntary or mandatory, depending on the basis of the structure. Arbitration is commonly used to resolve disputes between Government prime contractors and their subcontractors and in the commercial sector, especially in settling labor-management disputes.

Since the early 1900s the Comptroller General has taken the view that, unless a federal agency had explicit statutory authorization, it was prohibited from using a private arbitrator to decide on any claim involving the Government. However, under the Administrative Dispute Resolution Act of 1990, agencies can agree to binding arbitration, provided that the decision does not become final and binding on the agency for thirty days. During that period, the agency has a right to vacate the decision.[Ref. 45] Federal contract cases would be good candidates for arbitration when:

1. The standard to be applied already has been established by statute, precedent or rule.
2. The resolution of the dispute need not have precedential effect or establish major new policies.
3. The parties want the arbitrator to base the decision on some general standard without regard to the prevailing norm.
4. It would be valuable to have a decision-maker with technical, in addition to legal knowledge.

5. The parties desire privacy. [Ref. 46]

Arbitration is typically initiated in by one of three methods:

1. The parties agree before a conflict arises to submit all disputes to arbitration.
2. The parties agree to submit to arbitration after the dispute arises.
3. A court, agency or statute mandates that the dispute be arbitrated. [Ref. 47]

The specific procedures for presenting the case depends on the arbitration agreement, but is usually informal with limited discovery and relaxed evidentiary rules [Ref. 48]. Arbitration is appropriate when two conditions exist: there is no reasonable likelihood of a negotiated settlement and there will not be a continuing relationship after the settlement. Subsequently, arbitration is effective in determining who is right and wrong in a dispute and is not used to facilitate negotiations. Arbitration can be used in conjunction with mediation. In that, if a complete settlement cannot be achieved during mediation, the mediator can perform as arbitrator and decide on any issues not resolved.

1. Advantages

The relative speediness of the arbitration process is frequently cited as its major advantage. Studies of the

typical commercial arbitration found that the average time from submission of a dispute to a final decision is only sixty days. [Ref. 49]

This expeditious process ideally saves the parties significant time and money. Since discovery in arbitration is often curtailed and the hearing itself can be simpler than a judicial hearing, which employs all the rules of evidence, an arbitration subsequently takes less time and money. [Ref. 50]

By controlling the process, the parties can tailor the arbitration to best satisfy the unique requirements of the actual dispute. The ability of the parties to select the arbitrator is an distinct advantage. The parties can select an technical expert, which will eliminate the need to educate the arbitrator and will lead to a quick and well-informed decision. [Ref. 51] Additionally, the results of the arbitration can be kept private since the decision is not a public document, as it would be in a court proceeding.

2. Disadvantages

The efficiency of arbitration may be achieved at the expense of the quality of justice in individual decisions. In commercial and labor cases where there is a high volume of cases with fairly low stakes, trade-offs between an expeditious, inexpensive arbitration process and the assurance

of a more studied decision may be acceptable. But, in other types of disputes, parties may not agree to arbitration because they want the protection offered by the courts, or they want to maintain control over a settlement through a negotiation process. [Ref. 52]

Because arbitrations are not always well documented and are less subject to public scrutiny, they lack the quality control of litigation. Arbitration awards may not accurately reflect the merits of the case when the arbitrator simply decides to "split the difference" between the parties. Additionally, the parties may be reluctant to arbitrate because the scope of review is limited and they may be bound by an unsatisfactory result. [Ref. 53]

E. MINI-TRIALS

"Mini-trial" refer to specially designed processes, usually employed to resolve disputes that otherwise would be settled using litigation. The goal of mini-trials is to identify and discuss all available information and positions in order for the parties to reach a mutually satisfactory resolution. Mini-trials are tailored to the specific needs of the participants and may embody a number of different alternative dispute resolution processes. [Ref. 54]

Mini-trials are most appropriate in cases involving a small number of parties and are most useful in four types of disputes:

1. Where the parties have reached or anticipate reaching a negotiation impasse due to one party's overestimation (in the view of the other party) of the strength of its position.

2. Where significant policy issues exist which would benefit from a face-to-face presentation to decision-makers.

3. Where the issues are technical and decision-makers and third-party neutral advisors have subject matter expertise.

4. Where the imprimatur of a third-party neutral's expertise would aid in the resolution of the case. [Ref. 55]

Although the specific procedures of a mini-trial will vary depending on the specific case and the parties' desires, most mini-trials will contain the following key elements:

1. The parties voluntarily agree to use a mini-trial and they maintain the option to terminate the process at any time.

2. The parties negotiate a procedural agreement that specifies obligations and responsibilities in the mini-trial process.

3. Prior to the mini-trial, the parties informally exchange key documents, exhibits, summaries of witnesses' testimony and introductory statements.

4. The parties select a mutually acceptable neutral advisor to preside over the mini-trial. Unlike an arbitrator or judge, the neutral advisor has no authority to make a binding decision. The advisor's function will include asking questions to ascertain the strengths and weaknesses of each party and he may be asked to advise the parties on the likely outcome if the case went to trial.

5. The parties' lawyers make concise summary presentations. At a mini-trial rules of evidence do not apply; therefore if there is testimony by witnesses, it tends to be in narrative format under informal questioning.

6. Mini-trial presentations are made to high-level representatives of the parties who have clear settlement authority.

7. If the representatives are unable to negotiate a settlement immediately after the mini-trial, they may schedule further talks or presentations.

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For most parties who choose to participate in mini-trials the key considerations are time and money [Ref. 57]. Preparing and completing a mini-trial can take as short as a month as opposed to the two to four years required to complete a typical litigation. This results in substantial savings of personnel time, attorney fees, hearings, discovery burdens and opportunity costs. Because the majority of contract disputes involve questions of fact, it is more sensible for high level management to hear summary presentations and negotiate a settlement using good business judgement than it does for lawyers to litigate the facts for weeks or months[Ref. 58]. Although executives involved with mini-trials must devote some time studying the facts, circumstances and issues involved, they lose less time than they would have if the case had gone to trial [Ref. 59].

The mini-trial format allows the parties flexibility, they can design the process to best suit the dispute at issue. Presentations can be shortened or expanded, the neutral advisor's role can be broadened or eliminated and negotiations can be carried out with or without the presence of the advisor.[Ref. 60]

Mini-trials provide confidentiality to the parties; the proceedings are held in private so a mistake or dispute with a business partner will not be publicized. This helps preserve a long-term relationship between the parties.[Ref. 61]

2. Disadvantages

Mini-trials should be employed only in those cases which involve factual disputes and are governed by well established principles of law. Cases which present original issues of law or where witness credibility is a major factor, are handled more effectively by traditional litigation.[Ref. 62]

Cases which involve individuals against corporations are more appropriate for litigation in order to best serve the interests of the individual. And cases which involve more than two parties are also best handled by litigation since the logistical difficulties involved would usually not overcome the benefits of using a mini-trial.[Ref. 63]

F. FACT-FINDING

Fact-finding is the investigation of specified issues by a neutral third-party who is selected by the disputants and has subject matter expertise. Fact-finding may be adopted voluntarily or may be imposed by the courts. The Federal Government may participate in fact-finding which results in a final decision only if they can decline to accept the decision before it becomes final and binding.[Ref. 64]

Fact-finding is useful in resolving complex scientific, technical, business or economic issues where the presentation of proof is extremely difficult, expensive or time consuming.[Ref. 65]

The parties' initial agreement on the issues defines the neutral's role in fact-finding, as well as the subsequent use of the findings and recommendations. Once this agreement is framed, the role of the parties' is limited and the fact-finder proceeds independently. If fact-finding is used in connection with an ongoing settlement negotiation, it is recommended that the parties suspend negotiations on the issues requiring fact-finding until the fact-finder's report is received. However, the fact-finder may hold meetings with the parties to gather documents, statements and other types of necessary information.[Ref. 66]

The initial agreement of the parties' should include a deadline for receipt of the fact-finder's report. The report should be used to influence the parties' positions and will provide an catalyst to engage in further settlement negotiations.[Ref. 67]

1. Advantages

An advantage of fact-finding is that the neutral third-party is usually an expert on the issues in question, thus providing knowledge and insight which otherwise would not be readily available to the parties. The neutral would be able to analyze complex and confusing data and could provide the parties a summary of the findings; subsequently, the parties would be able to utilize their resources in other more productive ways.

Another advantage of fact-finding is that the parties design and control the process; they decide on the neutral third-party and the rules and procedures to be followed. If the fact-finding is voluntary (not court imposed) the parties can agree on the finding as a whole, partially or can decide to discard the finding totally.[Ref. 68]

2. Disadvantages

Fact-finding is only suitable for disputes of a factual nature. Usually a fact-finder's decision will not

result in a compromise between the parties' positions, but will result in a winner take all solution.[Ref. 69]

If the outcome of the fact-finding is non-binding on the parties, it may be admissible as evidence if the dispute goes to trial[Ref. 70]. Therefore, the parties may lose some confidentiality of the information they submitted during the fact-finding process.

G. SUMMARY

No one alternative dispute method is best for resolving all disputes. The nature of the dispute and the disputants' objectives will determine how they wish to resolve the issue. Among the factors that might determine the alternative dispute resolution method that will result in the most feasible solution are the nature of the relationship between the disputants, their need or desire for control over the outcome or process, the urgency to resolve the dispute and the desire for privacy.[Ref. 71]

Negotiation is the most common type of alternative dispute resolution. Negotiation is simply communication between people in an effort to reach an agreement. They are voluntary, informal and structured by the parties to at a mutually acceptable settlement in the most efficient manner.

Mediation is a more structured process in which a neutral third-party assists the parties reach an agreement. Mediation is most appropriate to use when the parties have reached, or anticipate reaching, a negotiation impasse. A mediator can effectively break down the barriers that have caused the negotiation impasse.

Arbitration is a process in which a dispute is submitted to a neutral third-party to render a decision. The standards for decision are agreed on in advance by the parties, and can be either binding or non-binding.

Mini-trials are a structured process is which the parties agree on a procedure for presenting their cases, in a highly abbreviated version of a trial, to senior officials from each side with the authority to settle the dispute. The exact procedures of the mini-trial are determined by the parties.

Fact-finding involves the use of neutrals to make determinations concerning disputed facts. Fact-finding is particularly useful when the disputed facts are of a highly technical nature and would best be resolved by experts.

IV. NEGOTIATED SETTLEMENT CASE ANALYSIS

A. INTRODUCTION

On 20 August 1992, the U.S. Navy and Lockheed Aeronautical Systems Company completed negotiations to settle a dispute concerning the termination of the P-7A Long Range Anti-submarine Warfare Capability Aircraft program. The case analysis was conducted using documents consisting of unpublished, internal memoranda of the Navy and Lockheed. Interviews of the chief negotiators for the parties were conducted in order to support and elaborate on the information contained in the documents.

B. BACKGROUND

On 7 October 1988, Lockheed was notified they had been competitively selected for award of a contract for Full Scale Engineering Development and production options of the P-7A. This aircraft was intended to replace the Navy's existing P-3 aircraft. On 5 January 1989, contract N00019-89-C-0097 was awarded on a fixed price incentive basis in the amount of $600,247,704, with a ceiling of 125% ($750,309,629) and a share ratio of 50% government/50% contractor.

In November 1989, Lockheed informed the Navy that they were experiencing weight and schedule problems. Further discussions indicated that Lockheed was projecting substantial losses on the P-7A program. Over a period of several months the Navy and Lockheed held discussions in order to reach an agreement concerning schedule, cost and technical difficulties. Despite their efforts, an agreement could not be made.

On 30 March 1990, the Navy notified Lockheed that its failure to make progress endangered performance under the terms of the contract and stated that unless the conditions were cured within ten days, the Navy would, under the terms of the contract, terminate the contract due to default. On 6 April 1990, Lockheed sent a detailed letter in response to the Navy's cure notice. Despite that response and subsequent discussions, the Navy terminated the contract for default on 20 July 1990. On 30 July 1990 the Navy issued a demand notice to Lockheed for the $124,094,357 in unliquidated progress payments.

On 30 August 1990, Lockheed filed a notice of appeal with the Armed Services Board of Contract Appeals. This was followed, on 30 October 1990 by an initial complaint against the Navy's termination for default. Lockheed felt they should not have been terminated for default since: (1) they never

failed to prosecute work under the terms of the contract in face of the Navy's direction to perform; (2) the Navy had waived delivery and certain performance requirements; (3) the Navy's failure to approve/disapprove specific requirements constituted an excusable delay; (4) the inconsistent contract requirements constituted a mutual mistake. Lockheed requested the termination for default be converted to a termination for convenience and that relief be granted in the form of cost recovery plus interest. The Navy's response to the complaint, dated 15 March 1991, maintained the termination for default was proper.

C. INITIAL NEGOTIATED SETTLEMENT

The Navy immediately realized the benefits of using negotiations to resolve the P-7A issues. Ongoing litigation would be time consuming and expensive, and there would be no guarantee of obtaining a favorable decision. An unfavorable decision mean the default termination would be converted to convenience, resulting in Lockheed being compensated for incurred work. Whereas, a favorable decision would confirm the Navy's default decision, enabling them to recover up to $124.1 million in unliquidated progress payments plus accrued interest, less compensation for the value of any residual inventory.

In December 1991 the Navy Program Manager began discussions with Lockheed regarding the resolution of the outstanding P-7A issues. The discussions resulted in a tentative agreement in which the Navy would obtain all the P-7A data, inclusive of P-3 data Lockheed used during the course of competing for the P-7A program, and unlimited rights to use such data for other than production of a new aircraft. Additionally, the pending litigation would be dismissed, and the Navy would be released from any current and future claims and appeals. The Navy would have to make no future payments. In consideration to Lockheed, the default would be converted to a no cost termination and Lockheed would retain the unliquidated progress payments of $124,094,357.

This tentative agreement was conditionally approved by NAVAIR contracting officials in May 1992; but the conditions required that a legal entitlement memorandum be obtained from NAVAIR counsel. This condition could not be met. NAVAIR counsel's position was that the unliquidated progress payments could only be used for the program it was appropriated for. The funds could be used for items within the scope of the P-7A program, but not for P-3 data, even though that data was used in the development of the P-7A contract data. The P-3 data rights would have to be obtained through appropriate funding and that funding was not available at that time. It was the

Navy's position that the benefit from obtaining the P-3 data rights could not be overlooked. They would have to negotiate a settlement in which they could obtain the P-3 data rights.

D. NEGOTIATION PLAN

1. Process for Fact-finding

On 5 June 1992, Lockheed and the Navy executed a "Plan for Proceeding with Negotiations Regarding P-7A Litigation". This plan consisted of six steps:

1. Trial counsel agrees on the proposed plan of action as set forth in the plan.

2. Counsel present the proposed plan to their respective principals with a recommendation for approval.

3. Upon agreement by the principals to proceed in accordance with the plan, the following actions must be accomplished:

   (a) Suspension of activities before the ASBCA for a stay period beginning 18 December 1991 which will continue in effect for 60 days after either party provides the other with written notice that the stay period is at end.

   (b) DCAA's audit of Lockheed's incurred cost of performance and the costs set forth in the claims.

   (c) Simultaneous exchange of specified documents by 5 June 1992.

   (d) Confidentiality with respect to all communications related to the settlement process; neither party waives rights under the discovery process; contemplated papers, witness summaries and litigation assessments will be classified as the work product of Counsel and subject to protection and non-disclosure of any of the discussions pursuant of the plan.

4. Preparation and exchange of papers which provide comprehensive statements of the parties' positions on the issues of the case.

5. Counsel to provide an assessment of litigative risk to their respective principals who, if they determine negotiations would be fruitful, will assign high level representatives to conduct such negotiations.

6. Parties will either agree on a settlement or, if no agreement is reached, reinstate the proceedings which have been stayed.

2. Elaboration of the Steps of the Negotiation Plan

Steps 1, 2, 3a, 3c, 3d and 6 of the negotiation plan are self-explanatory, the remaining steps of the negotiation plan are summarized below.

a. Step 3b

Lockheed has asserted four claims against the Navy in which monetary factors were present. These claims included:

1. Price adjustment claim - The purpose of this claim was to achieve an increase in ceiling price in order that Lockheed's recovery be increased if a determination is made to convert the termination from default to convenience. The basis of this claim was that the contract requirements were inconsistent and collectively not achievable and that the Navy interfered with Lockheed's performance.

2. Reformation claim - Lockheed submitted a claim to reform the contract type from fixed price incentive to cost. This claim reflects the Lockheed position that the statutes and regulations required the use of a cost type contract for the research and development effort and that the assumption that the Navy's requirements were collectively achievable was a mutual mistake.

3. Termination settlement proposal - This claim is premised on the result of Lockheed's appeal of the termination being converted from default to convenience.

4. The value of completed and partially completed R&D work - In the event of a unfavorable decision of Lockheed's claim, under FAR 52.249-9, subparagraph (f), they would be entitled to recover the cost of completed and partially completed R&D work even if the termination for default is sustained.

The purpose of the DCAA audit was to determine the Government's potential liability if the Lockheed appeal was successful, if the contract type was changed and the termination was converted to convenience. The results of the DCAA audit were also used by the Navy in determining their maximum liability. This amount was used in computing the litigative risk of the Navy as described in part 2c of this section. Lockheed used their own records of costs incurred to support their position.

b. Step 4

The legal position of Lockheed is based on six issues described in the Lockheed document "Initial Statement of Position" dated 3 July 1992. These issues were responded to by the Navy in its "Position Paper - P-7A Alternative Dispute Resolution" dated 30 October 1992. Lockheed submitted a rebuttal to the Navy's response in "Lockheed's Reply to the Navy's Position Paper - P-7A Alternative Dispute Resolution". These position papers covered the requirement of step 4 of the negotiation plan. The six issues of concern included:

1. Whether the Navy's P-7A requirements were inconsistent and not collectively achievable.

2. Whether, as a consequence of out-of-scope Navy demands relative to approval of the Lockheed approach to establishing the guaranteed weight empty, the required fatigue analyses, vital to maintaining weight and schedule requirements, were delayed and disrupted.

3. Whether the Navy rejected the terms on which the default termination is based and therefore, under its own statement of the contract, the Navy is precluded from termination for default.

4. Whether the Navy waived its right to terminate the contract for default for Lockheed's failure to meet the Best and Final Offer (BAFO) schedule and weight.

5. Whether or not the Navy can base a default termination on issues of contract interpretation in the absence of express Government direction, with which the contractor refuses to comply.

6. Whether Lockheed is entitled to recover costs incurred even if the termination is sustained.

The purpose of this step was to provide each party with an opportunity to evaluate each others position. The actual documentation consisted of numerous volumes of technical data used to support the positions of each party during the negotiations. By evaluating the documentation, each party had available information that could be used to ascertain their negotiation strengths, and subsequently formulate the parties' litigative risk. The actual negotiations did not attempt to resolve which party was at fault in each issue; but, was more concerned with the final outcome of the process.

c. Step 5

The Navy generally acknowledged there was at least a 15% risk of losing even a very strong case; that even if a case appears to be flawless, due to the nature of litigation, there still existed a chance of losing the case. The Navy's counsel in the P-7A case felt that even though their position was strong overall, there existed some risk that Lockheed might prevail with respect to some of the issues in question. In view of this, the Navy counsel considered it reasonable to assign the P-7A case a litigative risk of up to 30%. Meaning that, based on the parties' legal positions, it would be in the best interests of the Navy to pay Lockheed between 15% and 30% of its maximum potential liability now as part of the settlement and not risk having to pay the full amount the Navy would have to pay if it lost the case in litigation.

In determining their maximum liability, the Navy based its figures on the assumption that Lockheed would be successful in having the termination converted to convenience. It also assumed that they would be unsuccessful in adjusting the contract target and ceiling prices and would not establish an entitlement to costs in excess of the funds obligated and identified in the contract as the Government's maximum liability. However, the Navy counsel expressed that some

upward adjustment may be warranted to account for litigative risk that existed in these two areas.

There was no documentation available on the actual litigative risk that Lockheed felt they faced. In questioning Mr. Ron Finkbinder, Lockheed's lead negotiator in this case, he was not readily familiar with any actual figures that were derived as Lockheed's litigative risk. But he felt that Lockheed would have a strong position if the case went to litigation.

Despite the fact that each party felt they would be successful if the case went to litigation, they both felt that their best interests would be served if they used negotiations to settle the dispute. It was initially discussed that the negotiators for the case would be the Secretary of the Navy, Lawrence Garrett and Lockheed's Chief Executive Officer, Joseph Tellup. But the negotiators had to be changed since Mr. Garrett was unavailable (he was resigning his position). The obvious second choice for the Navy was Grey Cammack, the Director of Procurement Policy for the Office of the Assistant Secretary of the Navy (Research, Development and Acquisition). In that it was important to keep the negotiations on a level playing field, Ron Finkbinder, the Vice-president of Contracts was selected to negotiate the settlement for Lockheed.

E. ADVANTAGES OF USING A NEGOTIATED SETTLEMENT

Both Parties believed a negotiated settlement would be the best method to resolve the P-7A dispute. They knew that if the case went to litigation the process would take considerably longer to resolve; similar cases have taken up to 10 years to litigate. This would prove expensive to both the Navy and Lockheed. For example, Table 1 is the Navy's preliminary budget of the projected costs of litigation. Lockheed did not have any actual cost projections available; but, Mr. Finkbinder felt that negotiations would always provide less expensive solutions to disputes. Furthermore, Lockheed's lawyers were stressing the value of alternative dispute resolution as a tool to settle contract disputes.

Both sides felt that if the dispute went to litigation, it would have a negative impact on personnel resources. The litigation would disrupt other programs that P-7A engineers and associated personnel would be working on. These personnel would have to put valuable time and effort into the litigation, this could be minimized if the dispute was resolved by the quickest means possible. Additionally, it would prove extremely difficult to keep all personnel who would be needed to testify on the P-7A case available. People would be transferring to other programs and jobs which required relocation. Their unique knowledge on the P-7A would

not be readily available during the entire litigation and obtaining this information would prove to be difficult and inefficient.

It was important for the parties to control the dispute resolution process. The Navy felt that it was important to be able to obtain the P-3 data rights during the resolution. Lockheed was willing to relinquish the rights, on a limited

Table I COSTS OF LITIGATION

	FY 93	FY 94	FY 95	FY 96	TOTAL
LITIGATION SUPPORT	$2,104,000	$2,000,000	$1,000,000	$700,000	$5,804,000
ATTORNEYS	$200,000	$400,000	$400,000	$400,000	$1,400,000
PARALEGALS	$82,500	$165,000	$165,000	$165,000	$577,500
NAVAIR	$250,000	$500,000	$500,000	$500,000	$1,750,000
TRAVEL EXPENSES	$300,000	$125,000	$100,000	$60,000	$585,000
SUPPORT CONTRACTOR	$45,000	$90,000	$90,000	$90,000	$315,000
FORMER EMPLOYEES	$0	$35,000	$35,000	$35,000	$105,000
EQUIPMENT	$65,000	$28,000	$28,000	$28,000	$149,000
DEPOSITIONS	$0	$100,000	$140,000	$0	$240,000
HEARING TRANSCRIPT	$0	$0	$0	$15,000	$15,000
EXPERT WITNESSES	$0	$105,000	$210,000	$210,000	$525,000
TOTAL	$3,046,500	$3,548,000	$2,668,000	$2,203,000	$11,465,500

basis. If the case had gone to litigation, the process would have been less flexible and the P-3 issue would not have been addressed.

Both parties wanted to put the P-7A contract behind them. Lockheed felt that the contract was faulty from the beginning. They never felt comfortable with the Navy's requirements, that they were not collectively achievable. The Navy was anxious to settle the matter as well, and were willing to compensate Lockheed for some incurred costs in return for completed work and the P-3 data rights. The dispute was non-adversarial and a quick negotiated settlement would keep the environment for future contracts between the Navy and Lockheed positive.

F. PROPOSED SETTLEMENT STRUCTURE

The Navy developed a structure to the settlement agreement prior to the negotiation. By doing so they were able to organize the negotiations around specified terms. This facilitated the process and enabled it to be completed in an efficient manner. The proposed structure of the settlement agreement was:

1. Lockheed will be paid for its performance on the P-7A contract and for providing the Government with unlimited rights as outlined in paragraph 4. This amount will be determined during the negotiations.

2. Lockheed will return to the Government the difference between the negotiated amount it is due and the $124.1 million in unliquidated progress payments.

3. The termination for default will be changed to a termination by mutual agreement of the parties.

4. Lockheed will provide the Navy with:

   (a) All data, software, tooling and material generated, relied on or referred to by Lockheed during the course of competing for or developing the P-7A aircraft, including all P-3 aircraft documentation.

   (b) Unlimited rights to use all data provided under paragraph 4(a) for any purpose other than the procurement of new production aircraft.

   (c) Unrestricted rights to use all software provided under paragraph 4(a).

5. Lockheed will have all pending litigation dismissed and will release and waive all claims arising out of or in connection with the solicitation, award, performance and termination of the P-7A contract arising out of, or in connection with the procurement of any additional rights of data under paragraph 4(b).

6. The Government will not be required to make any further payments, in connection with the P-7A program or the use for any purpose of any data or software provided to the Government as part of the settlement, except if a separate agreement is made in the event the Government seeks to use the data for purposes of procuring new production aircraft.

7. Neither party will make any admissions or concessions regarding liability, nor will they make any disclosures regarding the settlement unless required to by law or by Congress. If requested by the Government, Lockheed will provide any witness or data needed to respond to any Congressional inquiry or hearing.

At this point the parties were ready to begin negotiations. The Secretary of the Navy was informed of the plan to initiate negotiations within two weeks. The purpose of this was to advise the Secretary of the Navy of the general nature of the dispute, the issues that existed, and that the

Navy had formulated a negotiation plan. The Secretary of the Navy was informed that negotiations were expected to begin within two weeks. There was no requirement for the Secretary of the Navy to approve the negotiations, but it was indicated that he would be advised prior to entering a final settlement.

G. NEGOTIATIONS

The Navy and Lockheed met at the offices of the Assistant Secretary of the Navy (Research, Development and Acquisition) on five different occasions during the period of 15 June 1993 to 20 August 1993. The negotiators, Mr. Finkbinder of Lockheed and Mr. Cammack of the Navy, were unassisted during the negotiations except for Mr. Sidney Tronic of the Navy. Mr. Marafino, Lockheed's Vice-Chairman of the Board and Chief Financial Officer, attended the last negotiation session on 20 August 1993. No legal or other personnel took part in the actual negotiations. After each negotiation session, however both of the negotiators advised and consulted concerned personnel on the status of the negotiation.

1. 15 JUNE 1993

During the negotiation session of 15 June 1993, Mr. Cammack introduced the proposed settlement structure outlined in Section F of this chapter. Mr. Finkbinder was familiar with the structure as it was similar to the structure of the

initial settlement agreement of December 1991, as discussed in Section C of this chapter. Mr. Finkbinder indicated that concerning data rights, Lockheed might prefer changing the "unlimited rights" to "Government purpose license rights" and may want to expand the limitations to include foreign military sales.

Mr. Cammack stated that the Navy's settlement position was based on five elements:

1. The value of residual inventory.
2. The value associated with obtaining increased data rights of P-3 data.
3. Litigation costs that would be avoided.
4. Litigative risk.
5. Intangibles.

Mr. Cammack proposed that $48 million was the value of those elements and that if Lockheed agreed, they would have to return the difference between that amount and the $124.1 million in unliquidated progress payments plus interest. Mr. Finkbinder indicated that Lockheed had a substantially higher figure in mind, but did not propose any counteroffer at that time.

Mr. Finkbinder questioned the need of the Navy to classify and fund the P-3 data rights as a new procurement. Mr. Cammack assured him that the Navy looked into the matter

extensively, but agreed to have Navy counsel discuss the issue with Lockheed counsel.

As a follow-up to the meeting, Lockheed agreed to consider the Navy's proposal of $48 million and would work on any changes they wanted to make to the wording of the terms and conditions of the settlement.

2. 28 JUNE 1993

During the negotiation session of 28 June 1993, Mr. Cammack and Mr. Finkbinder discussed the Navy's previous offer of $48 million. Lockheed stressed that they still wanted to settle the matter. However, they felt that $48 million was an extremely low figure. In response to such a low amount, Lockheed countered with an extremely high offer of $240 million. The Navy would have to pay the difference between this amount and the $124.1 million in unliquidated progress payments plus interest. The $240 million figure represented the amount Lockheed would be entitled to if they were successful in converting the termination for default to convenience.

Mr. Cammack responded that there was not enough litigative risk in the Navy's position to justify such a high settlement. At that time he felt the gap was too large in order for a settlement to be reached. Mr. Cammack even suggested that it might make sense to activate the 60 day

notice period for instituting the litigation process. Mr. Finkbinder opposed this suggestion and stated that Lockheed felt strongly about its position if the matter went to litigation, but $240 million was not Lockheed's final offer. He requested that the Navy reexamine their position and come back with an offer on the high side of their negotiation range.

Mr. Finkbinder also addressed the terms and conditions the Navy presented during the previous negotiation session. The most significant change they requested was that the Navy would only get whatever rights for technical data they would have received under the terms of the P-7A contract and not the unlimited rights they proposed. Mr. Cammack stressed the Navy's interest in resolving the issue of the P-3 data rights during this process and if that could not be accomplished, they would seek other methods to resolve the entire issue. Mr. Finkbinder agreed to discuss the Navy's concerns with Lockheed officials.

3. 16 JULY 1993

The P-3 data rights again where a main issue during the 16 July 1993 negotiation session. The Navy believed there were serious questions concerning the validity of Lockheed's claim that certain P-3 program technical data was proprietary. This had been a major contention, but the Navy was taking the

position that any P-7A settlement must give the Government a right to use any P-3 data for any Government purpose. Lockheed continued to dispute the Government's position, but understood the necessity of resolving the issue.

The parties discussed the proposed terms and conditions for the settlement. The dispute over the P-3 data had to be resolved before the rest of the terms cculd be addressed. Lockheed also desired to get a full release from the Government concerning the P-7A. Mr. Cammack noted that the Navy was limited in what it could do (for example, the Navy could not release Lockheed from claims by the Internal Revenue Service). He was confident that the parties could draft a release provision that would prove satisfactory to Lockheed.

The Navy had reevaluated its monetary position based on the latest DCAA audit position. They were now willing to pay $82 million in order to settle the issue. Mr. Finkbinder responded positively to this offer. He was disappointed however, when Mr. Cammack indicated this was in the general range of the Navy's final position. Mr. Finkbinder stated he would address the offer with Lockheed management.

4. 28 JULY 1993

Mr. Finkbinder indicated that Lockheed officials were pleased with the positive developments of the previous negotiation session and were eager to complete the

negotiations as quickly as possible. They still had areas of concern. Lockheed still resisted giving up total rights to the P-3 technical data. They were willing to allow the Government to use the data for internal purposes, but were reluctant to provide proprietary P-3 data to other contractors.

Lockheed still felt that they had a high probability of winning the litigation and were not prepared to substantially drop their monetary position. Based on the latest DCAA audit figures, Lockheed contended that the Navy should pay them $171 million. Mr. Cammack indicated that Lockheed was very conservative in estimating the litigation cost avoidance. Mr. Finkbinder acknowledged that Lockheed's estimate may be inflated, but he was optimistic that the parties could reach an agreement. Mr. Cammack was not nearly as optimistic and reiterated that the Navy's offer of $82 million during the previous negotiation session was close to its maximum position Mr. Cammack stated that it might be time to begin the 60 day stay period leading to the resumption of litigation. Mr. Finkbinder requested that Mr. Cammack discuss the situation with Navy officials.

5. 20 AUGUST 1993

On 6 August 1993, the Navy counsel had notified Lockheed by official correspondence, that they were initiating the 60 day stay period pursuant to step 3.A.4 of the "Plan for

Proceeding with Negotiations Regarding P-7A Litigation". This notification had intensified the urgency of the situation. Even though the Navy initiated the stay period, both parties still believed that settling the issues by negotiations would be in their mutual best interests. After some discussion, the parties agreed on the issue of the P-3 data, and that technical experts would be required to draft the appropriate language. Additionally, Lockheed agreed to the Navy's final proposal of the terms and conditions of the settlement. These also would be drafted at a latter time.

The only remaining issue was that of monetary compensation. Lockheed offered to settle for $119 million and the Navy proposed a settlement of $100 million, which translated into an offer of $94 million in costs and $6 million in interest. The parties remained $25 million apart, and the negotiation session ended that way.

After a two hour break, the negotiations resumed via telephone. During the break Mr. Cammack had met with the P-3 Program Manager and the P-7A litigation counsel in order to consider their position. The litigation counsel recalculated the Navy's monetary position and indicated they could support a settlement of up to $119 million. The P-3 Program Manager voiced concern over the wording of the P-3 data rights agreement. He felt the agreement would prohibit the Navy from

using the data rights during the Service Life Extension Program of the existing P-3 aircraft. The requirement to have the P-3 data rights for this program was vital.

During the telephone negotiations the remaining issues were resolved. Lockheed agreed to word the P-3 data rights so the Navy could use them for the Service Life Extension Program. They were just concerned that the rights could not be used for new production aircraft. After a series of offers and counteroffers, Mr. Finkbinder and Mr. Cammack reached an agreement of $111 million as monetary compensation to Lockheed.

H. THE P-7A SETTLEMENT AGREEMENT

When Mr. Finkbinder and Mr. Cammack came to the agreement on 20 August 1993, they were confident the agreed terms and conditions they proposed would stand. Even though they had to notify their respective officials of the settlement, they felt that, because of the authority they possessed, the way they justified their positions and by the previous discussions they held with the officials, that their agreement would stand.

The agreement was executed by two mechanisms, a modification to the P-7A Contract N00019-89-C-0097 and a fixed price contract under Basic Order Agreement N00019-92-G-0089 order 0007 for the P-3 data rights. The terms and conditions

to the contract modification included the following provisions:

1. The Navy's termination for default be converted to termination of the contract by mutual agreement.

2. Lockheed will pay the Navy $13,094,357. This amount is the difference between the unliquidated progress payment amount of $124,097,357 and the settled amount of $111 million. The $111 million total consists of Lockheed retaining $107 million of the unliquidated progress payment as compensation for its work on the P-7A program and Lockheed receiving $4 million for the P-3 data rights (as addressed in the Basic Order Agreement). All amounts are inclusive of interest.

3. Within six months Lockheed must deliver all P-7A data currently in their possession and all P-7A data they obtain in the future. All existing documents were being held within 2408 boxes in Rye Canyon, California; the contents of the boxes were to be indexed. The Government will have unlimited rights to the data without restrictions.

4. Within three months Lockheed must deliver to the contracting officer a list of all materials, residual inventory, test equipment and tooling it has for the P-7A program. This material must be delivered to a Navy designated site without cost to the Government.

5. Lockheed releases the Navy and the Navy releases Lockheed from all claims, demands and causes of action, in the present and in the future, relating to the P-7A contract. This is binding on the Navy only and not on the entire United States Government.

The terms and conditions for the P-3 data rights Basic Order Agreement allowed the Government to use those rights except under the following conditions:

1. The manufacture of a new or derivative P-3 aircraft.

2. An aircraft modification, alteration, redesign or remanufacture which replaces, or significantly alters 70% or more than the weight of an existing aircraft's frame.

3. For any non-United States Government owned and operated aircraft, including but not limited to foreign military sales contracts.

I. ANALYSIS OF THE P-7A SETTLEMENT

The terms of the settlement were to the mutual satisfaction of both parties. Even though it was not determined who was at fault, the terms agreed on were what both parties wanted the process to achieve. It was predetermined that the program would not continue, so an answer to the various technical problems did not have to be so determined. The main goals of the settlement was to close the program, to determine who would retain the data rights and the residual inventory, and to determine the value of those items. Also, the negotiations provided a forum where the future disposition of the P-3 technical data rights could be addressed.

Lockheed had no legitimate claim to the residual inventory and the technical data rights developed pursuant the P-7A program. Lockheed was under contract by the Navy to develop the technical data and build the P-7A aircraft, anything developed under the terms of the contract would become Navy property. The question existed on how much compensation Lockheed was entitled to in return for the work they performed. Through the negotiation process, based on the value

of what the Navy received and not on the total costs Lockheed incurred, the parties determined that an acceptable compensation would be $107 million for the work performed on the P-7A and $4 million for the P-3 technical data rights.

It was important to settle the question of the P-3 technical data rights. The flexible nature of the negotiations provided a ideal setting to do so. The results of the technical data rights issue determined during the negotiations was in the best interests of both parties. The Navy could use the data on an unlimited basis for the repair and modification of the existing P-3 aircraft. Since the Navy now had no immediate plans to replace the P-3 aircraft, it was important for the Navy to obtain the rights so they could develop an effective Service Life Extension Program for the P-3 aircraft. Lockheed was also satisfied with the settlement of the P-3 technical data rights issue. If the Navy decided to replace the P-3 aircraft, Lockheed's data rights were protected. They would therefore, have a distinct advantage in receiving any future production contract.

The negotiated settlement provided the best solution to the dispute over the P-7A program termination. The resources expended by the parties were minimal and substantially less than the potential costs that would have been expended to settle the case using litigation. The

solution provided by litigation would have been inferior to the actual solution in this case. It would not have met the needs of either Lockheed or the Navy.

J. SUMMARY

Both Lockheed and the Navy were satisfied with the negotiation process and results. They realized the advantages that the process provided and were determined to negotiate a settlement. The only time the negotiations were in doubt was when the Navy initiated the 60 day stay period leading to litigation. This served to grab Lockheed's attention and compelled them to lower their monetary position.

If the case went to litigation, the party that received the favorable decision would receive a better financial award than the amount they compromised on. Even though both parties felt that had a strong position, they were not willing to take the risks and bear the costs involved with litigation. Subsequently, the parties were willing to compromise their positions and develop a settlement agreement that was amicable to both Lockheed and the Navy.

V. CONCLUSION

A. SUMMARY

The Federal Government fully supports the use of alternative dispute resolution to settle contract disputes with their contractors. Recent legislation requires that all contracting agencies develop an alternative dispute resolution program to increase the knowledge and usage of alternative dispute resolution within the Federal Government.

There are numerous alternative dispute resolution methods available to contracting personnel. Familiarization with the characteristics, advantages and disadvantages of the different methods will help them ascertain which method would best settle each specific dispute.

The negotiated settlement of the P-7A dispute between Lockheed Corporation and the Navy is an excellent example of a successful alternative dispute resolution process. The dispute was settled in the most efficient and effective manner to the mutual satisfaction of both parties. Lockheed and the Navy realized the positive aspects of using alternative dispute resolution to settle the P-7A dispute.

Negotiation was the best alternative dispute resolution method available to settle the dispute. Other methods would

have required assistance from a neutral third-party, this was not necessary due to the characteristics of this particular case. The dispute was non-adversarial and they parties had similar desired outcomes of the settlement. A mediator was not needed to smooth over the negotiations or to set goals for the parties. The parties did not have to determine fault during the settlement process, therefore it was unnecessary to have an arbitrator determine which party was at fault. A fact-finder would have been useful if the technical issues had to be resolved in order for the program to continue. Since this was not the case, fact-finding would not have been helpful. A mini-trial could have been used to settle the dispute, however there were no advantages that mini-trials would have had over the negotiated settlement process that Lockheed and the Navy decided to use.

Litigation would have provided a solution to the dispute, but the costs of litigation would have outweighed the benefits. The only way the dispute would have gone to litigation was if the parties could not negotiate a fair and reasonable settlement. It was pre-determined that litigation would have been the next step in the dispute process, and that no other alternative dispute resolution method would have been considered. The parties felt they had the means available to determine a solution to the dispute. If they could not reach

an agreement, they would not solicit a neutral third-party to help them do so.

Currently, both Lockheed and the Navy follow policies that promote the use of alternative dispute resolution to settle contract disputes. The Navy follows the requirements of the Administrative Dispute Resolution Act of 1990 which promotes the use of alternative dispute resolution and Lockheed management stresses to contracting personnel that they should always try to resolve disputes by the easiest means available, they identified negotiations as that method.

B. CONCLUSIONS ON RESEARCH QUESTIONS

1. Primary Research Question

> Why was a negotiated settlement used to solve the P-7A program dispute and what were the characteristics and results of the process?

Both Lockheed and the Navy immediately realized that using a negotiated settlement to solve the dispute of the termination of the P-7A program would be the most efficient and effective process. The nature of the issues of the dispute and the goals the parties wanted the process to achieve, led to using a negotiated settlement. The issues were mainly of a technical nature; however, they didn't have to be resolved in order for the P-7A program to continue. It was already determined that the program would not be continued, the only

action left was to determine the terms of the settlement. This led the parties to use the easiest method to resolve the dispute. Despite the monetary effect a favorable decision in litigation would have provided; neither party was willing to risk their position and disregard the advantages of using a negotiated settlement provided in favor of going to litigation.

It was not essential to determine which party was at fault in order to resolve the dispute. They both wanted a resolution as quickly as possible in order to put the program behind them so they could concentrate their resources in other areas. The Navy also wanted to resolve the issue of the P-3 data rights and was able to do so using a negotiated settlement.

The negotiated settlement process did prove efficient and effective. It was completed during a four month period consisting of five negotiation sessions. The process required limited, but concentrated personnel and support resources. The negotiations concentrated on the underlying goals of the dispute resolution and not on determining which party was at fault. The results of the process were completed to the mutual satisfaction of both parties. The Navy received all completed work on the P-7A program and also acquired the P-3 data rights. Lockheed received a fair price for their work and the

data rights. Either party could have received a more favorable monetary decision from litigation, but after exploring their options they realized a negotiated settlement best served their interests.

2. Subsidiary Research Questions

a. What did both parties perceive to be the positive and negative aspects of using an alternative dispute resolution?

Both Lockheed and the Navy benefitted from the advantages that negotiations presented. The process was substantially faster then what litigation would have been. The process took four months to complete, which was considerably faster than had the case gone to litigation. This resulted in substantial savings in costs and resources.

There were times when the parties seemed to be far apart in their positions, but the non-adversarial and positive nature of the negotiations enabled the parties come to a relatively quick decision that was mutually satisfactory to both parties. The process was also flexible, with the parties remaining in control. The parties were able to develop and follow an agenda that would best satisfy the goals they desired to achieve through the settlement.

The process was accomplished privately. Going to litigation could have resulted in increased press coverage of the dispute. This subsequently might have pressured the Navy

into taking a stronger, less flexible and more adversarial approach in order to protect the best interests of the taxpayers. Lockheed would have done the same to protect their stockholders.

There were no major disadvantages of using negotiations to settle the dispute. The only indication of a negative aspect of the process was that Lockheed felt they were hindered by the discovery process. The process was in the Navy's favor since they were privy to all Lockheed's documents prior to the negotiations. If the dispute would have gone to litigation this would not have been the case.

b. Given the positive and negative aspects of the alternative dispute resolution, will alternative dispute resolution methods be the preferred option to resolve future contract disputes?

Lockheed does favor the use of alternative dispute resolution over litigation. They have no pre-determined criteria for which cases should be resolved using alternative dispute resolution, but they stress to contracting personnel that disputes should be settled using alternative dispute resolution whenever possible. Litigation should be used only as a last resort. The type of alternative dispute resolution that Lockheed usually uses is negotiations. They have not used many other types, but would consider using them in the future if the situation warrants.

The Navy hopes to increase the use of alternative dispute resolution in the future. As Federal agencies implement their alternative dispute resolution programs, as required by the Administrative Dispute Act of 1990, they should become more familiar with and increase their use of alternative dispute resolution.

c. What is the Federal Government's current policy concerning the use of alternative dispute resolution to settle contract disputes with their contractors?

The current policy of the Federal Government is to use alternative dispute resolution instead of litigation whenever possible. Alternative dispute resolution have always been available for contracting officers to use for settling contract disputes. Contracting officers, however, have been reluctant to use them due to their unfamiliarity with the different processes. To increase the use of alternative dispute resolution by Government contracting officers, Congress passed the Administrative Dispute Resolution Act of 1990. This Act reiterates the preference of using alternative dispute resolution whenever possible and directs Federal agencies to develop a program for alternative dispute resolution and to provide training for that program.

d. What are the common types of alternative dispute resolution available to the Federal Government for solving contract disputes?

There are a myriad of different types of alternative dispute resolution available to the Federal Government. The most common types are negotiation, mediation, arbitration, mini-trial and fact-finding. Each of these methods has its own distinct characteristics, advantages and disadvantages. Before selecting a particular type of alternative dispute resolution, a contracting officer must become familiar with the different methods in order to determine which would provide the most efficient and effective means to settle the issues of the dispute.

C. RECOMMENDATIONS

The following are recommendations dealing with the use of alternative dispute resolution:

1. The Federal Government should continue to use alternative dispute resolution whenever feasible to settle contract disputes.

2. The Navy should develop a model alternative dispute resolution program, based on the requirements of the Administrative Disputes Act of 1990, for use by their various contracting agencies.

3. The Navy should provide ample funding for alternative dispute resolution training, as the benefits of the training will outweigh the costs.

4. The promotion of alternative dispute resolution should come from the highest levels of the agency. Alternative dispute resolution programs will only be effective if they are supported from the top and contracting personnel are encouraged to follow the programs.

5. The Navy should provide incentives for using alternative dispute resolution. Agencies should be recognized and rewarded for using alternative dispute resolution.

D. AREAS FOR FURTHER RESEARCH

The following are areas for future research dealing with alternative dispute resolution:

1. A similar case study of a different type of alternative dispute resolution. It would be most effective and interesting if the dispute was in its early stages and the researcher could assist in the process. Limitations on time and money would exist, but it would prove valuable if the researcher could analyze any part of the process as it takes place.

2. Develop a model alternative dispute resolution program for the Navy based on the requirements of the Administrative Disputes Act of 1990.

LIST OF REFERENCES

1. Administrative Conference of the United States, From Conflict to Cooperation: Alternative Dispute Resolution, Public Interest Video Network, Bethesda, MD, December 1993.

2. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, August 1992, page 1.

3. Goldberg, Stephen B., et al, Dispute Resolution, page 19, Little, Brown and Company, 1985.

4. Basler, T., et al., The Collected Works of Abraham Lincoln, Volume II(1953-1955)

5. American Bar Association, The 1992 Presidential Campaign, ABA Journal, October 1992.

6. Breger, Marshall J., "Legislative Developments, Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988", The Arbitration Journal, page 20, September 1988.

7. U.S. Congress, Senate, Report of the Committee on Government Affairs, Administrative Dispute Resolution Act, report 101-543, page 4, 101st Congress, 2nd session, 19 October 1990.

8. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page i, February 1992.

9. Breger, Marshall J., "Legislative Developments, Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988", The Arbitration Journal, page 21, September 1988

10. U.S. Congress, Administrative Dispute Resolution Act, Law 101-552, 101st Congress, 2nd session, 15 November 1990.

11. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 11, February 1992.

12. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 11, February 1992.

13. Crowell, Eldon H. and Pou Jr., Charles, " Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 190, Vol. 49, No. 1, 1990.

14. Bednar, Richard J., Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes, page 2, Crowell & Moring, Washington D.C., March 1989.

15. Bednar, Richard J., Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes, page 7, Crowell & Moring, Washington D.C., March 1989.

16. Bednar, Richard J., Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Dispute, page 7, Crowell & Moring, Washington D.C., March 1989.

17. Crowell, Eldon H., and Pou, Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 193, Vol. 49, no. 1, 1990.

18. Crowell, Eldon H., and Pou, Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 190, Vol. 49, no. 1, 1990.

19. Crowell, Eldon H. and Pou, Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 191, Vol. 49, no. 1, 1990.

20. National Institute for Dispute Resolution, Paths to Justice: Major Public Policy Issues of Dispute Resolution, page 31, October 1983.

21. Bednar, Richard J., Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes, page 5, Crowell & Moring, Washington D.C., March 1989.

22. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 9, February 1992.

23. U.S. Congress, Administrative Dispute Resolution Act, Law 101-552, 101st Congress, 2nd session, 15 November 1990.

24. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 20, February 1992.

25. U.S. Congress, Administrative Dispute Resolution Act, Law 101-552, 101st Congress, 2nd session, 15 November 1990.

26. U.S. Congress, Administrative Dispute Resolution Act, Law 101-552, 101st Congress, 2nd session, 15 November 1990.

27. U.S. Congress, Administrative Dispute Resolution Act, Law 101-552, 101st Congress, 2nd session, 15 November 1990.

28. U.S. Congress, Administrative Dispute Resolution Act, Law 101-552, 101st Congress, 2nd session, 15 November 1990.

29. U.S. Congress, Senate, Report of the Committee on Governmental Affairs, Administrative Dispute Resolution Act, Report 101-543, page 11, 101st Congress, 2nd session, 19 October 1990.

30. U.S. Congress, Senate, Report of the Committee on Government Affairs, Administrative Dispute Resolution Act, Report 101-543, page 11, 101st Congress, 2nd session, 19 October 1990.

31. U.S. Congress, senate, Report of the Committee on Government Affairs, Administrative Dispute Resolution Act, Report 101-543, page 14, 101st Congress, 2nd session, 19 October 1990.

32. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 16, February 1992.

33. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR: Guidance for Agency Dispute Resolution Specialists, page 29, February 1992.

34. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 12, February 1992.

35. Laufer, Deborah S. and Pou, Jr., Charles, ADR E-mail Pilot Project, page 18, Administrative Conference of the United States, 2 December 1993.

36. Administrative Conference of the United States, Office of the Chairman, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution, page 2, June 1987.

37. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 3, February 1992.

38. Mayer, James H., "Alternative Dispute Resolution Procedures- How To Do More for Less Cost", Contract Management Magazine, page 11, February 1994.

39. Goldberg, Stephen B., et al, Dispute Resolution, page 19, Little, Brown and Company, 1985.

40. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 12, February 1992.

41. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, August 1992.

42. Administrative Conference of the United States, Mediation: A Primer for Federal Agencies, page 5.

43. Riskin, Leonard L. and Westbrook, James E., Dispute Resolution and Lawyers, page 92, West Publishing Company, 1987.

44. Riskin, Leonard L. and Westbrook, James E., Dispute Resolution and Lawyers, page 98, West Publishing Company, 1987.

45. Administrative Conference of the United States, Implementing the Alternative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists, page 13, February, 1992.

46. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 234, Vol. 49, no. 1, 1990.

47. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 231, Vol. 49, no. 1, 1990.

48. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 232, Vol. 49, no. 1, 1990.

49. Behre, Kirby, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?", Public Contract Law Journal,page 70, August 1986.

50. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute resolution Techniques", Maryland Law Review, page 232, Vol. 49. no. 1, 1990.

51. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 232, Vol. 49, no. 1, 1990.

52. National Institute for Dispute Settlement, Paths to Justice: Major Public Policy Issues of Dispute Resolution, page 13, October 1983.

53. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution

Techniques", Maryland Law Review, page 233, Vol. 49, no. 1, 1990.

54. Riskin, Leonard L., and Westbrook, James E., Dispute Resolution and Lawyers, page 5, West Publishing Company, 1987.

55. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, page 11, August 1992.

56. Goldberg, Stephen B., et al, Dispute Resolution, page 272, Little, Brown and Company, 1985.

57. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 208, Vol. 49 no. 1, 1990.

58. Crowell, Eldon H., and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques", Maryland Law Review, page 201, Vol. 49, no. 1, 1990.

59. Henry, James F., "Mini-trials - Scaling Down the Costs of Justice to Business", Across the Board, page 47, Vol. 21, no. 10, October 1984.

60. Henry, James F., "Mini-trials - Scaling Down the Costs of Justice to Business", Across the Board, page 47, Vol. 21, no. 10, October 1984.

61. Henry, James F., "Mini-trials - Scaling Down the Costs of Justice to Business", Across the Board, page 47, Vol. 21, no.10, October 1984.

62. United States Claims Court, "General Order No. 13, 15 April 1987

63. American Bar Association, "Report of Subcommittee on Alternative Means of Dispute Resolution", page 43, 1985/1986.

64. U.S Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, page 8, August 1992.

65. American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution, An ADR Primer, page 3, Washington D.C., August 1989.

66. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, page 8, August 1992.

67. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, page 9, August 1992.

68. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, page 8, August 1992.

69. Neslund, Nancy, "Dispute Resolution: A Matrix of Mechanisms", Journal of Dispute Resolution, page 227, Volume 1990, no. 2.

70. Neslund, Nancy, "Dispute Resolution: A Matrix of Mechanisms", Journal of Dispute Resolution, page 223, Vol. 1990, no. 2.

71. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, page 30, February 1992.

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